

PUBLIC LAW BOARD NO. 6776

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION LOCAL NO. 2052**

and

**THE PITTSBURGH & CONNEAUT
DOCK CO.**

AWARD NO.1

CASE NO. 1

STATEMENT OF CLAIM:

The Organization requests that the Carrier assign the appropriate number of employees back to the minimum standard seniority pool and pay each employee improperly placed in the shop a day's pay at the applicable operating rate in addition to all other earnings the grievants may have received for the period of the Agreement violation.

FINDINGS:

Public Law Board No. 6776, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

This is the first in a series of three interrelated claims pertaining to the furloughs, force assignments and recalls of several employees.

The Carrier operates a dock facility on Lake Erie at Conneaut, Ohio. Primary commodities such as iron ore, coal and stone are transferred between lake vessels and rail cars. The work at the dock is performed by two groups of employees. Production employees who work in the Machine Division operate the machines used to load and unload vessels and rail cars. Maintenance employees who work in the Shop Division maintain and repair the equipment used to run the dock.

The parties agree that the seniority lists for the two divisions are separate and distinct. While all employees have a seniority date on the Master roster which represents their date of hire, the seniority date which primarily governs their rights to bid on assignments, and by which they are furloughed and recalled, are those dates they have acquired on the Department Rosters. Under the parties' Agreement, Machine Division employees cannot work in the Shop Division, nor can Shop Division employees bid to a Machine Division position, without forfeiting their Division seniority.

Much of the activity at the dock fluctuates with the season. In the winter months, the need for production employees subsides and Machine Division employees are furloughed as the work activity decreases. At the same time, maintenance work in the Shop Division increases as the machinery is idled. Often times there have been insufficient numbers of maintenance employees available, and additional workers were needed, but production employees had no way to transfer to the Shop Division without forfeiting their Machine Division seniority.

The Carrier and the Organization addressed this issue in a January 7, 1972 Memorandum of Understanding (MOU) set forth in Section XXV of the Agreement. It stated in pertinent part:

The present Labor Agreement, effective October 27, 1971, does not permit employees to hold seniority on skill occupation rosters outside their respective division, department, or shop; therefore, an operating employee bidding into a shop forfeits his rights in the Machine Division Roster.

This restriction presents a problem in that the Company has need, as in past years to add skilled help to the shop force during the winter repair season but cannot utilize available operating employees. To permit skilled operating employees to bid into the shops during the winter repair season, the Company and Union agree to establish a Memorandum of Understanding that operating employees, who are qualified, may bid into shop jobs on a temporary basis without losing Machine Division rights nor establish shop roster rights.

Whenever it is necessary to post a notice for temporary winter repair help in the shops, the notice will so state that it is a temporary job and not subject to the conditions of a regular job occupation.

On February 1, 2001, the Carrier posted a notice for bids for ten temporary shop jobs. No bids were received for these positions.

On February 9, 2001, the Carrier posted a layoff and transfer bulletin, stating that ten Machine Division employees would be transferred to the Shop Division effective February 11, 2001. These employees worked the temporary assignments until March 12 when five were recalled to the Machine Division. The remaining five employees were recalled to the Machine Division at the end of March.

The instant claim seeks a day's pay for each day the Claimants were assigned to the temporary assignments in the Shop Division. It is the Organization's position that the Carrier violated the Agreement by force assigning the Claimants to

positions that they had no obligation to protect. Because they had no Shop Division seniority, the Organization argues, they were under no contractual obligation to protect Shop Division jobs.

During the on property handling of the case, the Carrier contended that it properly filled the jobs that were not bid by eligible employees in accordance with Section IV of the Agreement, the Management Rights provision. That provision gives the Carrier discretion to manage the direction of the working force, the Carrier argued, and thus the assignment of furloughed employees to the unfilled shop jobs was within the right and responsibility of management.

Before addressing the merits of the parties' respective arguments, the Board first considers two matters raised by the Carrier in its submission and before the Board. First, the Carrier contended that the Organization breached the time limits set forth in Section VII of the Agreement by failing to timely file its Step 4 appeal to arbitration. On that basis, Carrier argues that the claim should be dismissed.

Normally, procedural arguments are waived if they are not asserted on the property. In this instance, however, the parties had exhausted all steps of the claims appeal process. The Carrier's first opportunity to raise its timeliness objection was before the Board. Nevertheless, as the evidence developed, it became clear that the objection was without merit. An October 22, 2001 letter from the Carrier expressly granted the Organization's request for an extension on the time limit until November 6, 2001. Since the Organization's November 4, 2001 appeal statement was within the agreed upon extended time line, the Carrier's argument is unfounded.

The second argument raised by the Carrier in its submission does not withstand a waiver challenge. Carrier argued for the first time before the Board that, when there were no bidders from the Machine Division for the temporary positions, the next step was to go to the Minimum Standard Seniority Pool in accordance with Section XIV 9 (c) of the Agreement. We may not consider argument *de novo*. Our function is essentially that of an appellate body. The scope of our review is limited to the arguments and evidence that have been developed during the handling of the claim on the property. Significantly, the parties have incorporated this fundamental principle in the public law board agreement establishing this Board. Our adherence to that basic tenet requires that the Carrier's argument be rejected.

Turning to the merits, we find after careful review that the Carrier's reliance upon its management rights provision is misplaced. Carrier's rights are not unfettered but are limited by the specific provisions of the Agreement. For purposes of this case, that means that the general management rights provision must give way

to the specific provisions of the January 7, 1972 MOU. Therein, the parties have agreed that "operating employees, who are qualified, may bid into shop jobs on a temporary basis..." The MOU further states that such temporary jobs are "not subject to the conditions of a regular job occupation."

Machine Division employees have no contractual obligation to protect the work at issue. They have no seniority in the Shop Division. The use of the word "may" in the MOU indicates that bidding to Shop jobs is voluntary and not mandatory. We are of the view that the Carrier cannot agree to a voluntary acceptance by Machine Division employees of Shop jobs on the one hand, and then force assign them on the other. This is particularly true in light of the language contained in the MOU which recognizes that operating employees who elect to bid into shop jobs are not subject to the conditions that would apply if they were regularly occupying the positions. Based on these factors, we find that the Agreement was violated when the Machine Division employees were force assigned to the shop jobs.

The remaining question concerns the remedy. The instant claim asks that the Board order an appropriate number of employees back to the Minimum Standard Seniority Pool. This portion of the requested remedy is beyond the Board's jurisdiction. To that extent, the claim is denied.

The Organization also requests that the Board redress the improper force assignment by awarding a day's pay to each of the employees who were force assigned to the Shop jobs. The Organization contends that the claim for a day's pay in addition to earnings is essential if the Agreement is to retain its meaning. This is particularly true in view of the element of intent present. The Organization submits that the Carrier decided to take an expedient approach when its job posting was not enthusiastically received. If no monetary remedy is awarded, the Carrier would have license to continue to violate the Agreement at will.

In support thereof, the Organization cites a long line of arbitral authority under the Railway Labor Act which holds that the appropriate remedy where an employee wronged may not have suffered an earnings loss is to award a day's pay until the violation is ended. See, e.g., Third Division Award Nos. 26593; 29068; First Division Award Nos. 17600; 20122; 23996; 24280; 24481.

Carrier contends that the Organization's remedy request is excessive, punitive and impermissible because the employees suffered no economic loss as a result of the Carrier's action. On the contrary, they earned more by virtue of the force assignment than they otherwise would have had they remained furloughed. Moreover, the Carrier argues that there is no practice on the property to award penalty payments. See, Public Law Board No. 6020, Award No. 2.

In considering the foregoing arguments, we note that the Carrier is correct when it states that the traditional justification for compensatory damages is to put the affected employee in the position he would have been in had the Carrier not breached the agreement. This principle, cited in Public Law Board No. 6020, Award No. 2 involving these same parties, is based on the notion that the employee should be made whole for losses suffered.

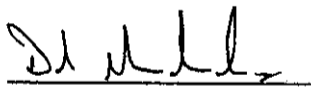
But this analysis has its own problems in a case such as this, where the Agreement has been violated, apparently with impunity, but no loss of earnings can be shown. Although the employees may not have suffered direct harm, the Organization has – a provision negotiated by it and for which concessions in other areas may have been made was ignored. Even a well-intentioned carrier has no incentive to work harder to prevent misassignment of work under these circumstances, and a carrier seeking to avoid in practice what it cannot eliminate in bargaining is undeterred from efforts to shirk its bargain.

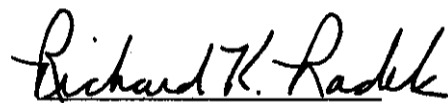
In addition, where work is wrongfully assigned, a monetary award is justified on the theory that even though the Organization cannot show a loss of earnings, such a loss may well have occurred. The Carrier, if required to assign the work within the proper classification, might have had the work done on an overtime basis. Work opportunities have been lost. Alternatively, the Carrier's action in misassigning the work might mean at some indefinite date in the future, an employee in the shop will be laid off sooner than he would otherwise have been. It is extraordinarily difficult for the Organization to prove either of these scenarios. Yet the difficulty of proof does not wholly negate the possibility that there either was or will be a loss of work for the Organization employees. That is why there is longstanding authority for the award of a day's pay in circumstances such as these. The assessment of a day's pay for each day there was a breach of the specific Agreement provision herein shall be sustained.

AWARD

Claim sustained in accordance with Findings.


ANN S. KENIS
Neutral Member


Carrier Member
Douglas Mandalas


Organization Member
Richard K. Radek

Dated this day of January, 2005.